

NOT TO BE PUBLISHED

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION**

DENNIS A. SCHNEIDER,

Petitioner,

vs.

RUSSELL B. JERGENS, PALO ALTO
COUNTY SHERIFF,

Respondent,

STATE OF IOWA,

Respondent-Intervenor.

No. C02-3056-MWB

**REPORT AND RECOMMENDATION
ON MOTION TO DISMISS**

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I. INTRODUCTION

This matter is before the court on a motion to dismiss and supporting brief filed by the respondent-intervenor State of Iowa (the “State”) on March 13, 2003. (Doc. Nos. 35 & 36) The State filed an appendix of State court documents relating to its motion on March 24, 2003. (Doc. No. 42) On March 20, 2004, the respondent Russell B. Jergens (“Jergens”) joined in the State’s motion. (Doc. No. 38) The petitioner Dennis A. Schneider (“Schneider”) filed a resistance and supporting brief on March 24, 2003. (Doc. Nos. 40 & 41; *see also* Doc. No. 39, correcting a quotation in Doc. No. 41) The State filed a reply to the resistance on March 28, 2003 (Doc. No. 43), and Schneider filed a response to the reply on April 3, 2003. (Doc. No. 44) The matter is now fully submitted and ready for review.

By order entered August 15, 2002, this matter was referred to the undersigned United States Magistrate Judge for “review of the record and the pleadings, the conduct of any necessary evidentiary hearings, the hearing of any oral argument that may be necessary and the submission . . . of a report and recommended disposition of the case.” (Doc. No. 5) Accordingly, the court turns to consideration of the State’s motion to dismiss.

II. FACTUAL AND PROCEDURAL BACKGROUND

In a previous Report and Recommendation on Jergens’s motion to dismiss, the court summarized the facts of this case as follows:

On March 31, 1999, Schneider’s former wife, Debra Rodgers, obtained a restraining order against Schneider (the “no contact order”) directing Schneider to stay away from Rodger’s residence and place of employment, and prohibiting Schneider from entering upon any premises occupied by Rodgers. On July 7, 2001, both Rodgers and the parties’ daughter, Diane Schneider, were employed by the Wellness Center in Emmetsburg, Iowa. At a time when he knew Debra Rodgers was not at work, Schneider went to the Wellness Center to give

his daughter a car title. Although Rodgers was not present, she was “on call.” Rodgers filed an application with the Palo Alto County District Court to hold Schneider in contempt for violating the no contact order because he had gone to her place of employment.

The Palo Alto County District Court granted Rodgers’s application and found Schneider to be in contempt of the no contact order. Schneider was sentenced to serve thirty days in the Palo Alto County Jail, and was ordered to pay \$1,000 in attorney fees to Rogers’s attorney.

Schneider has filed the present action to challenge the constitutionality of the Iowa procedure in these types of contempt actions. In his detailed petition for writ of *habeas corpus*, Schneider raises a number of constitutional challenges to the Iowa procedure. Among other things Schneider argues that when a defendant is found guilty of contempt, the defendant has no opportunity for appellate review. On the other hand, if a plaintiff loses a contempt proceeding, the plaintiff is entitled to an immediate appeal as of right. As a result, Schneider argues he had no recourse after he was found guilty of contempt, and he argues this is a violation of his right to due process and equal protection under the law.

(Doc. No. 11, p. 2; footnote omitted) In addition, Schneider filed a petition for writ of certiorari with the Iowa Supreme Court, and the petition was denied on June 26, 2002. (See Doc. No. 1, Ex. 3)

After Chief Judge Mark W. Bennett denied a prior motion to dismiss filed by the respondent Jergens, the undersigned granted the State’s motion to intervene, and required Schneider to comply with Local Rule 24.1 by filing a statement particularizing his constitutional challenge to Iowa law. Schneider did so on February 14, 2003 (Doc. No. 33), stating the statute in question is Iowa Code section 665.11, which provides:

No appeal lies from an order to punish for a contempt, but the proceedings may, in proper cases, be taken to a higher court for revision by certiorari.

Schneider asserts he is not seeking to invalidate the statute itself on constitutional grounds, but rather, he is asking this court to interpret the statute to mandate that when a defendant in a criminal contempt proceeding seeks certiorari to review a criminal contempt order, certiorari *must* be granted. (See Doc. Nos. 33 & 44) He argues that when the statute is applied to him, “and he makes application for certiorari which is denied, he is denied equal protection having requested appellate review but having been denied that review. It is not necessary to invalidate the procedure for review, only to impose upon that procedure the minimum due process guarantee of equal protection in the application.” (Doc. No. 44, pp. 2-3)

Despite his protestation to the contrary, Schneider also argues in the alternative that the statute itself is unconstitutional, as follows:

Either § 665.11, Iowa Code, must be interpreted to guarantee, in the application, the right of review when certiorari is requested ***or*** the statute must be held to deny equal protection and due process of law protected by the Fourteenth Amendment to the United States Constitution.

(Doc. No. 33, p. 3; emphasis added)

On March 13, 2003, the State filed its motion to dismiss. The State argues Schneider’s first ground for relief, which encompasses his constitutional challenge (see Doc. No. 1, ¶ 12(j)(A), pp. 10-12), is both procedurally defaulted and unexhausted, and in any event, fails to state a claim upon which relief may be granted. The court will consider each of these arguments in turn.

ANALYSIS

A. Procedural Default

The State argues Schneider failed to raise his constitutional challenge to the appellate procedure in his petition for certiorari, and therefore, he failed to preserve the issue for this

court's review. Schneider argues it would have been premature to challenge the procedure in his petition for certiorari because such a claim would have been based on speculation that his petition was going to be denied. He asserts that if he had raised the issue in his petition for certiorari, and the petition had been granted, then the claim would have been moot specifically because the petition had been granted.

The State relies on *In re C.M.*, 652 N.W.2d 204 (Iowa 2002), a case the State asserts is “functionally identical to this one – where the appellant sought to challenge the constitutionality of the mechanism of review in the appeal process itself on due process and equal protection grounds.” (Doc. No. 36, p. 4) In *C.M.*, the Iowa Supreme Court held the appellant's failure to include constitutional challenges to the appellate procedure in her petition on appeal resulted in a failure to preserve those issues for review. *Id.*, 652 N.W.2d at 207.

C.M. involved a termination of parental rights. *C.M.*'s parents appealed the termination of their parental rights, and the Iowa Court of Appeals affirmed. *C.M.*'s mother filed a petition for review by the Iowa Supreme Court, arguing the appellate procedures applicable to the case violate a parent's constitutional rights to equal protection and due process. The constitutional challenge involved Iowa's particular procedure relating to cases involving termination of parental rights. Addressing “a heightened concern at the federal level that permanency for children be accomplished as soon as feasible,” *C.M.*, 652 N.W.2d at 208, the Iowa Legislature, on July 1, 2001, authorized the Iowa Supreme Court to adopt rules to expedite the disposition of termination appeals. The result was the adoption of a set of appellate rules relating *solely* to termination cases. See Iowa R. App. P. 6.151-6.154.

The new rules provide, among other things, that an appellant in a termination case must file a notice of appeal within fifteen days, as opposed to the thirty days allowed in other appeals. Full briefing is not allowed as in other appeals, but instead, the petition on

appeal must include “[a] statement of the legal issues presented for appeal, including a statement of how the issues arose and how they were preserved for appeal,” together with “supporting statutes, case law, and other legal authority for each issue raised, including authority contrary to appellant’s case, if known.” Iowa R. App. P. 6.151(2)(d) & (e). “Relying on the appellant’s petition on appeal, any response to the petition, the juvenile court record, and the trial transcript, the appellate court then conducts a de novo review of the trial court’s termination order.” *C.M.*, 652 N.W.2d at 209 (citing Iowa R. App. P. 6.154(1)). The appellate court then may affirm the termination decision, reverse the decision, remand the case for further proceedings, “‘or set the case for full briefing pursuant to rules 6.13 and 6.17 or as directed by the court.’” *Id.* (quoting Iowa R. App. P. 6.154(1)). The *C.M.* court noted “full briefing becomes available *only* at the option of the reviewing court,” and “refusal by the court of appeals to grant full briefing is not grounds for further review by this court.” *Id.* (citing Iowa R. App. P. 6.154(2)).

C.M.’s mother argued “the new appellate procedures impermissibly distinguish between classes of appellants without a legitimate state purpose,” and “the use of a petition on appeal in lieu of full briefing violate[d] her right to equal protection of the law by restricting her access to the appellate courts in comparison to appellants in other civil and criminal cases.” *Id.* The court found the appellant had failed to preserve the constitutional issues for review, holding as follows:

The appellant did not challenge the constitutionality of the governing rules in her petition on appeal. Constitutional questions must be preserved by raising them “at the earliest opportunity after the grounds for objection become apparent.” *State v. Yaw*, 398 N.W.2d 803, 805 (Iowa 1987); *accord State v. Wages*, 483 N.W.2d 325, 326 (Iowa 1992). Once the appellant filed her notice of appeal, the procedures at issue were applicable. Consequently, a challenge to the constitutionality of those procedures could have been made in the petition on review filed by the appellant. Having failed to include her

constitutional claims in her petition, those issues are not preserved for review.

C.M., 652 N.W.2d at 207.

In *C.M.*, the grounds for the appellant's constitutional objections to the appellate procedures were apparent *at the time she filed her appeal*. She had the expedited rules in termination cases before her, and could have raised her constitutional challenges to the procedures in her petition on appeal. Such is not the case here. Schneider correctly notes that the grounds for his constitutional objections were not known until his petition for certiorari was denied by the Iowa Supreme Court. The court agrees that to assert his challenge in his petition for certiorari would have been premature and speculative.

Furthermore, in the case of a criminal contemnor's appellate rights, there is no obvious, compelling State interest comparable to that which exists in the case of termination of parental rights. The *C.M.* court discussed the State's compelling interest in assuring the proper care and treatment of "every child within its borders," including the "obligation to establish child custody quickly so that children do not suffer indefinitely in parentless limbo." *C.M.*, 652 N.W.2d at 211. The court found "the State's interest in obtaining a permanent home for a child as soon as possible is a compelling governmental interest" justifying the expedited appellate procedures in termination cases. *Id.* The court noted the expedited appellate procedure "is narrowly tailored to address the State's compelling interest" in promptly resolving termination cases. *Id.* It cannot be said that in the case of the statute Schneider challenges, the compelling State interest is so clear as to obviate any constitutional challenge to the statute.

The State argues, "The Iowa courts were fully capable of evaluating [Schneider's] Count I constitutional claims related to Iowa Code section 665.11 had they been presented in his petition for certiorari." (Doc. No. 36, p. 5) The court agrees; however, the

statement begs the question of whether Schneider’s constitutional challenge appropriately could have been raised at that stage of the proceedings.

The court finds “the earliest opportunity after the grounds for objection bec[a]me apparent” was the time when the Iowa Supreme Court denied Schneider’s petition for certiorari. The court finds Schneider’s constitutional challenge to the statutory appellate process for contempt proceedings is not procedurally defaulted, and the State’s motion to dismiss Count I of Schneider’s petition should not be granted on the basis of procedural default.

B. Exhaustion of State Remedies

The State argues Schneider’s constitutional challenge has “never been fairly presented or properly exhausted in any State court proceeding.” (Doc. No. 35, ¶ 4) The State therefore claims Schneider’s petition is mixed, containing both the unexhausted claim and exhausted claims, and the petition is subject to dismissal without prejudice unless Schneider voluntarily withdraws Count I of his petition.

The United States Supreme Court explained in *O’Sullivan v. Boerckel*, 526 U.S. 838, 119 S. Ct. 1728, 144 L. Ed. 2d 1 (1999):

Before a federal court may grant habeas relief to a state prisoner, the prisoner must exhaust his remedies in state court. In other words, the state prisoner must give the state courts an opportunity to act on his claims before he presents those claims to a federal court in a habeas petition. The exhaustion doctrine . . . however, raises a recurring question: What state remedies must a habeas petitioner invoke to satisfy the federal exhaustion requirement?

Id., 526 U.S. at 842-43, 119 S. Ct. at 1731 (citations omitted). Similarly, subsection 2254(c), 28 U.S.C. § 2254(c), provides:

An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the

meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

The court must determine whether Schneider has the right, under Iowa law, “to raise, by any available procedure, the question presented.”

The State argues two procedures remain available to Schneider. First, the State argues he should file a petition for rehearing in the Iowa Supreme Court pursuant to Iowa Rule of Appellate Procedure 6.27. Among other things, Rule 6.27 requires a party to “state with particularity the points of law or fact which in the opinion of the petitioner the supreme court has overlooked or misapprehended[.]” Schneider responds that the rule is not applicable in this case because the Iowa Supreme Court did not “overlook” or “misapprehend” the points of law at issue, which were not raised in Schneider’s petition for certiorari for the reasons discussed above. The court agrees that a petition for rehearing under these circumstances would be an inappropriate and futile exercise.

The State further claims Schneider can file an application for post-conviction relief to raise his constitutional claims, “at least in the context of an ineffectiveness claim.” (Doc. No. 36, p. 6) Schneider points out that post-conviction relief is available only to persons who have been convicted of “a public offense.” (Doc. No. 41, citing Iowa Code § 822.2) He argues criminal contempt does not meet the definition of a “public offense,” with the result that PCR relief is not available to him. The State counters that criminal contempt *does* meet the definition of “a public offense,” and claims Schneider misunderstands Iowa law and procedure. (Doc. No. 43)

The Iowa Code refers to “public offenses” in over 130 separate statutes. The term sometimes is defined with reference to violations of specific statutes. *See, e.g.*, Iowa Code § 124.402(2) (violation of statute regulating distribution of controlled substances is a “public offense” that constitutes either a serious misdemeanor or an aggravated misdemeanor); § 172B.2 (failure of person transporting livestock to execute transportation certificate at

request of law enforcement constitutes a “public offense”); §§ 235A.19(4), 235B.10(4) (disclosure of certain records and evidence in juvenile appeals constitutes a “public offense”); § 455B.213(4) (disclosure of certain information regarding applicants for certification to operate treatment plants and water distribution systems is a “public offense”); § 692.5 (disclosure of certain judicial records is a “public offense”); § 692.9 (placing surveillance data in files or storage systems is a “public offense”).

In general, “A public offense is that which is prohibited by statute and is punishable by fine or imprisonment,” excluding “nonindictable offenses under either chapter 321 [motor vehicles and law of the road] or local traffic ordinances.” Iowa Code §§ 701.2, 692.1(14). Public offenses are divided into felonies and misdemeanors. “A public offense is a felony of a particular class when the statute defining the crime declares it to be a felony.” Iowa Code § 701.7. “All public offenses which are not felonies are misdemeanors.” Iowa Code § 701.8. Nowhere in the Iowa Code is “public offense” defined specifically to include criminal contempt of a court order in a civil matter, nor does the Code expressly exclude criminal contempt from the definition of “public offense.”

Considering the applicability of the general definition to this case, although contempt may be punishable by imprisonment, the purpose for the imposition of that penalty differs from the purpose of imprisonment in the context of the commission of a crime. As the Iowa Supreme Court explained in a case involving a contempt proceeding for failure to pay child support:

This is a civil contempt application; and in connection with such proceeding we said in *Nystrom v. District Court*, 244 Iowa 735, 739, 58 N.W.2d 40: “Even under the general authority inhering in all courts to punish for contempt it has been said the object and purpose ‘**is not to punish a public offense**, but to compel obedience to and respect for the order of the court.’ *Gibson v. Hutchinson*, Judge, 148 Iowa 139, 140, 126 N.W. 790, Ann. Cas.1912B, 1007; *State v. Baker*, 222 Iowa 903, 905, 270 N.W. 359.”

McDonald v. McDonald, 170 N.W.2d 246, 247 (Iowa 1969) (emphasis added). *Accord Fall River Cty., S.D., ex rel Dreyden v. Dryden*, 409 N.W.2d 648, 650 (S.D. 1987) (citing *McDonald*).¹ See also *Harkins v. Harkins*, 256 Iowa 207, 127 N.W.2d 87, 90 (Iowa 1964) (quoting *Nystrom*), *overruled by statute with regard to payment of child support, McNabb v. Osmundson*, 315 N.W.2d 9, 15 (Iowa 1982) (overruling *Nystrom*, citing Iowa Code § 598.23).²

Under the current state of Iowa law, it appears Schneider's violation of the contempt order would not constitute a "public offense." His conduct did not constitute either a felony or a misdemeanor under Iowa law, and appears to be exactly the type of proceeding the Iowa Supreme Court would deem to be civil in nature. However, this result is not crystal clear from the Iowa Code and case law. In any event, as discussed below, under the circumstances of this case it is not necessary to decide the issue of whether criminal contempt constitutes a "public offense."

¹The South Dakota court held as follows:

We have held when "the contempt consists in the refusal of a party to do something which he is ordered to do for the benefit or advantage of the opposite party, the process is civil, and he stands committed till he complies with the order. The order in such a case is not in the nature of a punishment, but is coercive, to compel him to act in accordance with the order of the court.'" *Karras v. Gannon*, 345 N.W.2d 854, 856 (S.D. 1984) (quoting *State v. Knight*, 3 S.D. 509, 514, 54 N.W. 412, 413 (1893)). See *State v. Bullis*, 315 N.W.2d 485, 487 (S.D. 1982). D. Dobbs, *Handbook on the Law of Remedies*, § 2.9, at 97 (1973).

409 N.W.2d at 650.

²Child support is treated differently from other types of contempt in civil actions. The statutory penalty for failure to pay child support "is primarily punitive and only indirectly coercive." *McNabb*, 315 N.W.2d at 15. Cases involving failure to pay child support differ from the present action on public policy grounds. This case more properly falls into the type of contempt where the punishment imposed was designed "to compel obedience to and respect for the order of the court." *McDonald*, 170 N.W.2d at 247.

Iowa law provides that a PCR proceeding is available to someone convicted of or sentenced for violating a public offense, who makes certain specific claims challenging the conviction or sentence. See Iowa Code § 822.2 (listing seven specific types of claims that may be raised in a PCR action). Schneider's constitutional challenge to the appellate procedure for criminal contempt convictions does not fall within any of the seven types of claims listed in the statute. *Id.* As a result, a PCR proceeding would not provide a means for Schneider to raise his constitutional challenge.

The State does not really contest this conclusion, but suggests Schneider could file a PCR action on the basis that his counsel was ineffective for failing to raise the constitutional claim in the petition for certiorari. The court having found, above, that Schneider's constitutional claim was not ripe for consideration at the time his petition for certiorari was filed, it naturally follows that his counsel could not be ineffective for failing to raise the claim. As a result, filing a PCR action based on counsel's ineffectiveness for failing to raise the claim would, like filing a petition for rehearing, be a futile exercise.

Failure to exhaust state remedies is excused when, although a claim has not fairly been presented to the state courts, any available State corrective process is "ineffective to protect the rights of the applicant." 28 U.S.C. § 2254(b)(1)(B)(ii); *Duckworth v. Serrano*, 454 U.S. 1, 3, 102 S. Ct. 18, 19, 70 L. Ed. 2d 1 (1981) (exception to exhaustion requirement exists when "there is no opportunity to obtain redress in state court or if the corrective process is so clearly deficient as to render futile any effort to obtain relief."); *Henderson v. Lockhart*, 864 F.2d 1447, 1450 (8th Cir. 1989) (same); cf. *Krempel v. Prairie Island Indian Community*, 125 F.3d 621, 622 n.1 (8th Cir. 1997) (acknowledging futility exception, and citing *Duckworth*).

In this case, the available corrective processes – a petition for rehearing or a PCR action – would be deficient for purposes of providing an avenue for Schneider to raise his constitutional challenge to the statutory appellate procedure in contempt actions. Neither

process would provide an appropriate means for Schneider to bring his constitutional claim before the Iowa courts. The court therefore finds Schneider's claim in Count I of his petition is properly before this court, and the State's motion to dismiss Count I on the basis of failure to exhaust State remedies should be denied.

C. Failure to State a Claim

The State argues that even if the court were to find Schneider's claim is not procedurally defaulted, and he has exhausted all the available State remedies with regard to Count I, the claim "is also subject to dismissal for failure to state a claim and is without merit." (*Id.*, ¶ 6) The State asserts there is no constitutional right to appellate review, appellate review is not a guaranteed minimum due process right under Iowa law, and there is no "suspect class" of persons convicted of criminal contempt. (Doc. No. 36, pp. 37)

Schneider responds that the State's arguments "do not address the equal protection issue raised." (Doc. No. 41, p. 11) He couches the question at issue as follows:

[W]hat compelling interest or rational basis exists to distinguish the defendant in a contempt proceeding from all other criminal defendants whose liberty is placed in jeopardy and to distinguish the defendant in contempt proceedings from the plaintiff whose liberty is not placed in jeopardy and yet has a right of appeal.

(*Id.*) He argues he is a member of a class composed of all criminal defendants whose liberty is taken from them by state action, and he asserts the statute in question treats criminal contemnors differently from all other similarly situated criminal defendants, thus denying them due process. (Doc. No. 41, pp. 11-15; see Doc. No. 1, p. 12)

The court finds Schneider has raised a valid question regarding the constitutionality of the statute. The Iowa Supreme Court has considered similar constitutional challenges in other contexts. For example, in *Shortridge v. State*, 478 N.W.2d 613 (Iowa 1991), the court considered the constitutionality of a statute governing prisoner appeals from disci-

plinary actions. In an attempt to “stem the flow of direct appeals in prison disciplinary cases,” *id.*, 478 N.W.2d at 615, the Iowa Legislature “amended the postconviction statute by limiting the right of direct appeal in prison disciplinary cases and authorizing, instead, a right to proceed by writ of certiorari.” *Id.*, 478 N.W.2d at 614. The State, however, retained the right of direct appeal. The Iowa court noted, “Whether deliberate or unintentional, this legislated distinction creates two classes of appellants: one with a right of direct appeal and one without.” *Id.*, 478 N.W.2d at 615.

The court held the statute to be unconstitutional, explaining as follows:

It is true that the right of appeal is purely statutory, not constitutional, and may be granted or denied by the legislature as it determines. *Boomhower v. Cerro Gordo County Bd. of Adjustment*, 163 N.W.2d 75, 76 (Iowa 1968); *In re Chambers*, 261 Iowa 31, 33, 152 N.W.2d 818, 820 (1967). This court has held, however, that once a right of appeal is provided[,] “[i]t may not be extended to some and denied to others.” *Chambers*, 261 Iowa at 33, 152 N.W.2d at 820. When procedures enacted by the State serve to deny one person the right of appeal granted to another, equal protection of the law is denied. *Waldon v. District Court*, 256 Iowa 1311, 1316, 130 N.W.2d 728, 731 (1964).

. . . .

In fairness . . . whatever avenue of appellate review is deemed appropriate by the legislature, that right of appeal must be reciprocal. [Citations omitted.] [The statute] plainly casts prisoners and the State in unequal roles insofar as appeal from adverse disciplinary decisions is concerned. Under the *Chambers* and *Waldon* decisions cited above, that inequality cannot be permitted. Thus we hold that so long as the State is still afforded a right of direct appeal from prison disciplinary decisions, that right must extend to prisoners as well. Any amendment to this statutory scheme must be reciprocal in its application.

Id. The Iowa Legislature later amended the statute again, changing the right of review of prison disciplinary actions from a direct appeal to appeal by writ of certiorari for both the State and the prisoner. See *Scott v. State*, 517 N.W.2d 718 (Iowa Ct. App. 1994). The Iowa Court of Appeals held the statute did not violate equal protection because the State and the prisoner now were treated equally. *Id.*

The statutory scheme which the *Shortridge* court held to be unconstitutional is remarkably similar to the statute challenged by Schneider. The court finds Schneider has raised a valid constitutional question upon which relief may be granted, and respectfully recommends the State's motion to dismiss be denied as to the issue of failure to state a claim.

D. Certification of Question

The State suggests that if the court denies its motion to dismiss, it would be appropriate to certify Count I of Schneider's petition to the Iowa Supreme Court, to allow the Iowa courts an opportunity to consider the claim. The court agrees certification would be appropriate. Ordinarily, "as a matter of comity, federal courts should not consider a claim in a habeas corpus petition until after the state courts have had an opportunity to act." *Rose v. Lundy*, 455 U.S. 509, 515, 102 S. Ct. 1198, 1201, 71 L. Ed. 2d 379 (1982). Indeed, absent a ruling from the Iowa Supreme Court on Schneider's constitutional challenge, this court would be unable to employ the standard of review required by the Antiterrorism and Effective Death Penalty Act of 1996, as interpreted by the United States Supreme Court in *Williams v. Taylor*, 529 U.S. 362, 102 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). That standard of review presupposes a claim will be "adjudicated on the merits in State court proceedings" before reaching this court for consideration in a *habeas* action. See 28 U.S.C. § 2254(d). The court therefore recommends Schneider's constitutional challenge to the

appellate procedure in criminal contempt actions be certified to the Iowa Supreme Court pursuant to Iowa Code chapter 684A.

IV. CONCLUSION

For the reasons set forth above, **IT IS RECOMMENDED**, unless any party files objections³ to the Report and Recommendation in accordance with 28 U.S.C. § 636 (b)(1)(C) and Fed. R. Civ. P. 72(b) within ten (10) days of the service of a copy of this report and recommendation, that the State's motion to dismiss be denied.

³Objections must specify the parts of the report and recommendation to which objections are made. Objections must specify the parts of the record, including exhibits and transcript lines, which form the basis for such objections. See Fed. R. Civ. P. 72. Failure to file timely objections may result in waiver of the right to appeal questions of fact. See *Thomas v. Arn*, 474 U.S. 140, 155, 106 S. Ct. 466, 475, 88 L. Ed. 2d 435 (1985); *Thompson v. Nix*, 897 F.2d 356 (8th Cir. 1990).

IT IS FURTHER RECOMMENDED that the question of whether Iowa Code section 665.11 violates the rights to due process and equal protection under the law of a defendant found guilty of criminal contempt be certified to the Iowa Supreme Court.

IT IS SO ORDERED.

DATED this 10th day of June, 2003.

PAUL A. ZOSS
MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT